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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1186

LEON S. DURE, TRUSTEE OF THE GEORGIA, FLORIDA & ALABAMA RAILROAD COMPANY, AND THE GEORGIA, FLORIDA & ALABAMA RAILROAD COMPANY, DEBTOR, *Petitioner*,

v.

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE AND S. RALPH WARNKEN, CONSTITUTING THE REORGANIZATION COMMITTEE OF THE SEABOARD AIR LINE RAILWAY COMPANY, AND LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above-named Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled cause on January 23rd, 1946, dismissing Petitioner's appeal from an order and judgment of the United States District Court for the Eastern District of Virginia.

STATEMENT OF THE MATTER INVOLVED.

Because the District Judge and the Circuit Court of Appeals, in affirming his judgment and opinion in a mere per curiam order, both totally failed to apply the principles of constructive trusts, as recently announced by this Court in the

case of *Young* v. *Higbee Co.*, 65 Sup. Ct. Rep., p. 594, 89 L. ed. 578, and a long line of decisions from this Court and also decisions of the Circuit Court of Appeals for the Fourth Circuit, and because of the serious matters involved, we earnestly petition this Court to grant the writ of certiorari prayed for and fully decide the case upon its merits.

SUMMARY STATEMENT OF UNDISPUTED FACTS

The Georgia, Florida & Alabama Railroad Company, hereinafter referred to as the G.F.&A., is a Georgia railroad now running from Tallahassee, Florida, to Richland, Georgia. Until about 1942 it had a line extending from Tallahassee to Carabele, Florida, on the Gulf of Mexico coast, but this line was abandoned just at the beginning of the war. A glance at the Seaboard Air Line system map will show the strategic position occupied by this little Georgia railroad company. The G.F.&A. was chartered on July 16th, 1927, and was the successor to the Georgia, Florida & Alabama Railway Company. In the new corporation the Seaboard Air Line Railway Company was the sole owner of the common stock of 10,000 shares of no par value, which in the reorganization, in consideration of the lease hereinafter mentioned, was secured for only $1,000.00. In its reorganization, dictated and controlled by the Seaboard, 10,000 shares of first preferred stock and 5,000 shares of second preferred stock of $100 par value each, were issued. A bond issue of $1,750,000.00, secured by a first mortgage on all the properties of the G.F.&.A., was issued. At the same time the Seaboard System leased the G.F.&A. lines for 99 years at a rental of approximately $180,500.00 per annum, which guaranteed the payment of interest on the bonds and the dividends on both first and second preferred stock. The lessee was to pay all taxes and operation and maintenance expenses.

Under this lease and the ownership of all the voting stock at that time the Seaboard went into complete control of the G.F.&A. When the Seaboard Air Line Railway Company went into receivership in the United States District Court for the Eastern District of Virginia on December 23, 1930, the

Receivers of that line took over the G.F.&A. The Receivers paid the lease rental up to January 1, 1931, but since that day neither the G.F.&A. nor its Receivers or Trustee have ever received anything for the use of its lines by the Seaboard Receivers.

In about May, 1933 the Seaboard Receivers applied, at or near the same time, for orders in the Receivership Court and the Interstate Commerce Commission for the right to disaffirm the lease and abandon the operation of the G.F.&A. lines. (See Order No. 143-B of Judge Way, July 6, 1934, and I.C.C. Order, Exhibit No. 1 in Transcript of Evidence in final hearing before Judge Chestnut on June 18, 1945, all of which were offered in evidence and constituted a part of the Transcript of Record before the Circuit Court of Appeals).

The Interstate Commerce Commission after full hearing denied the petition, and thereafter the Seaboard Receivers themselves applied for the operation orders in the Virginia and Florida U. S. District Courts. A similar petition for operation orders was filed in the United States District Court of the Middle District of Georgia, where the G. F. & A. had likewise landed in receivership because of the default in the payment of the interest upon its bonds, due entirely to the breach of the lease contract by the Seaboard System.

Clearly if the Seaboard Air Line Railway Company itself had remained out of receivership, or had been returned by the Court to its corporate management, and had committed the acts later perpetrated by the Seaboard Receivers and the Reorganization Committee, the Court would never have permitted it to have taken advantage of its own wrong in defaulting on its lease obligation.

But because of these operation orders, and other facts misapplied to the law by Judge Chestnut, it is contended that no trust relationship existed between the parties in this action.

In substance the operation orders, all secured upon the petition or consent of the Seaboard Receivers, provide that the lines of the G. F. & A. would be operated by the Seaboard Re-

ceivers for the account of the G. F. & A. (Judge Akerman's Order, April 27, 1936, folio 98.) The accounting was to be in accordance with the General Formula, and the operation could cease at any time upon notice to the G. F. & A. with the approval of the Receivership Courts. It was provided that the General Formula was adopted subject to any change thereafter made by the Courts. (See Judge Deaver's Order in the U. S. District Court for the Middle District of Georgia, April 27, 1936, and similar orders of the other Courts. Folio 109.) The G. F. & A. Receivers were likewise given the right to terminate the operation upon the same notice of six months, and in the event of termination by either party an accounting should be had under the General Formula, subject to change in formulas by the Courts. The Seaboard Receivers were given a first lien upon all G. F. & A. properties for any operation losses. The Receivers were thus given the advantage of using the lines of the small Georgia corporation as an integral part of its system but without any fear or risk of any losses in the operation. The records of the Interstate Commerce Commission and of the Receivership Courts indicate that the value of the G. F. & A. properties at that time was at least $3,000,000.00. The accounts of G. F. & A. and the Seaboard Receivers were squared up, if such this maneuver could be called, to December 31, 1934, leaving the G. F. & A. with a claim of some sort for rent from January 1, 1931 to January 1, 1935, of approximately $829,000.00, which is still a mythical claim of some character, never yet decided. (See Judge Deaver's Order, folio 108, and Reports by the G.F. & A. to the Interstate Commerce Commission and the annual Seaboard Reports in evidence before Judge Chestnut, and included in the Transcript of Evidence before the Circuit Court of Appeals in this case.)

Practically all of the annual reports of the Seaboard Receivers since 1936, particularly that of 1938 offered in evidence before Judge Chestnut, contain this statement:

> "Whether or not the GF&A has any allowable claim against Seaboard Air Line Railway Company under the

lease for the period subsequent to December 23, 1930, or for any part of such period, and the extent and amount of such claim, if any, is a legal question."

The records of the Seaboard Receivership show that after many long months of investigations and hearings Special Master Taylor in his Final Report repudiated the General Formula as unfair and recommended the Kennedy Formula for all Seaboard Receivership settlements and for the Reorganization program. His report was filed under date of July 20, 1943, and his report in this respect, as well as most others, was approved by Judge Chestnut on December 13, 1943. (See Orders of Judge Chestnut and Judge Akerman in the record, Folio 34.)

The application of the Kennedy Formula to the operation of the GF&A lines by the Seaboard Receivers changed the small Georgia corporation's financial status tremendously. Both formulas were applied to the actual freight and traffic passing over the GF&A lines. Under the General Formula the line was practically a deficit line; whereas under the Kennedy Formula it was an earning line.

All the way through from December 23, 1930, the GF&A had been operated by the Seaboard Receivers as a valuable and integral part of the Seaboard System.

Immediately upon the adoption of the Kennedy Formula as the yard stick for the settlement of the accounts of the GF&A, the ownership of the bonds of that Company became a vital matter. The Special Master in his plan of reorganization had allotted the GF&A bondholders new certificates, etc. worth about $750.00 per bond. Judge Chestnut in his Order of December 13, 1943, changed this to $750.00 cash, which was the value placed by the Court itself upon the GF&A bonds. The Reorganization Committee of the Seaboard about this time had developed a plan whereby this Committee would get the approval of the Court to have the Seaboard Receivers advance sufficient funds by which the Committee or the Court would purchase the GF&A bonds at $750.00 per bond. About 90% of the 1750 bonds issued by the GF&A were available for pur-

chase through a Bondholders' Committee of the Georgia corporation.

Accordingly in the early part of 1944 the Reorganization Committee filed a petition before Judge Chestnut seeking the approval of the Court for the completion of its plan. The Special Master had recommended the appointment of the Reorganization Committee to perfect the plan of reorganization of the Seaboard's System and Judge Chestnut shortly after he had taken over the Seaboard matter after the death of Judge Way of Norfolk appointed this Committee. Of course, it had no powers other than those given by the Court, and were powerless to act without the aid and cooperation of the Seaboard Receivers.

Prior to this, in March 1943, the original holders of the first preferred stock of the GF&A, despairing of receiving anything for their stock, sold all of the 10,000 shares on the open market to W. H. B. Simpson, of Greenville and W. G. Borer, of Philadelphia, for approximately $5,000.00.

The matter of the purchase of the bonds by the Reorganization Committee came up for hearing before Judge Chestnut in Baltimore on February 8, 1944.

The record shows that shortly after acquiring the first preferred stock Mr. Simpson was elected President of the GF&A and immediately attempted to get the Seaboard Receivers to advance or loan the GF&A sufficient funds with which to buy in its bonds and retire them. It also reveals that the Reorganization Committee had planned to purchase the same bonds, or 90% thereof, at $750.00 per bond and use the bonds for full face value in the foreclosure proceedings pending in the Receivership action in the U. S. District Court for the Middle District of Georgia. Principal and past due interest as of February 8, 1944, made the bonds have a face value of slightly over $2,000.00 each.

At the hearing at Baltimore on February 8, 1944, the record shows that Mr. Simpson was present as a bondholder of the GF&A and urged the Court to purchase the bonds for the

account of the GF&A instead of for the Reorganization Committee. It further shows that Judge Chestnut demanded information as to the existence of any funds or money due to GF&A out of which he could purchase the bonds for its account. The S. A. L. Receivers were also present at the hearing on February 8th and gave their full approval and consent to the plan, and recommended the purchase of the bonds as a sound investment of Seaboard Receivership funds. They were silent as to the amount due the GF&A.

At the final hearing before Judge Chestnut on June 18, 1945, it appeared that as of February 1, 1944, the Chief Accounting Officer of the Seaboard Receivers had made a calculation as to the amount of operation profits coming to the GF&A under the Kennedy Formula and that the amount as of January 1, 1944, was approximately $1,100,000. (See testimony of Jones at pages 110 and 111 of Transcript of Testimony of June 18, 1945, F. 38). At the time of the de novo hearing on June 18, 1945, the amount had increased to $1,667,455. After the hearing on February 8, 1944, Judge Chestnut granted the petition of the Reorganization Committee and refused the request of Mr. Simpson to purchase the bonds for the account of the GF&A, and passed Order R-1 on that date. This Order authorized the purchase of the bonds at $750.00 per bond and directed the Seaboard Receivers to advance the necessary funds for this purpose. The Reorganization Committee not only did not furnish the money but by the provisions of Section F of the Order were expressly declared not to be obligated in any respect for the repayment of the money advanced by the Seaboard Receivers.

The foreclosure proceedings in Georgia were immediately revived after a dormant session of six or eight years and it is admitted that the bonds were to be used against the GF&A at their full value.

The GF&A in July 1944 filed a petition for reorganization under Sec. 77 in the U. S. District Court for the Middle District of Georgia.

The Trustee of the GF&A appointed by the Bankrupt Court

sought by petition to bring the Seaboard Receivers and the Reorganization Committee into the Georgia Court for the purpose of accounting and to decide the ownership of the bonds. The Respondents challenged the jurisdiction of the Georgia Court and the late Judge Lovett, of Savannah, sustained their plea to the jurisdiction of the Court.

As neither the GF&A, whose corporate status has been preserved and kept alive, nor its Receivers, were parties to the hearing on February 8, 1944, the Reorganization Committee realized that there would remain a serious question as to its title to the bonds and, on March 14, 1945, petitioned Judge Chestnut to reopen the matter and hear the case de novo (See Mr. Adkins' statement to the effect that the hearing was de novo, page 9, Transcript of Evidence of the hearing on June 18, 1945, which was a part of the Transcript of Record before the Circuit Court of Appeals).

After full hearing Judge Chestnut reaffirmed his former order and filed a lengthy opinion in which he said, among other things: "I do not think the resulting relationship (created by the operation orders) constituted a trust of any character." (F. 43)

THE ISSUE

So the issue is clear. Was there such a trust or fiduciary relation between the Seaboard Receivers and G.F.&A. as to prohibit them from directly or indirectly acquiring title to the bonds in question, at about one-third of the face value, with funds partly built up by the GF&A as an integral part of the Seaboard System and then using the bonds at full value against the GF&A in order to obtain possession of its properties?

If the fiduciary or trust relationship existed then this Writ should be granted so that this Court, upon a full inquiry, could decide whether the Circuit Court of Appeal's decision should be reversed. If a trust or fiduciary relationship did not so exist, our petition should be denied.

OPINION BELOW

The per curiam opinion of the Circuit Court of Appeals, reported in 152 Fed. (2nd) 756 appears in the printed record at Folio 126. The opinion of Judge Chestnut thereby adopted is reported in 62 Fed. Supp. at 207, and appears in the record at Folios 15 and 27.

JURISDICTION

The jurisdiction of the Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code Annotated, Title 28 Sec. 347 (a)).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals ignores the decision of this Court in the case of *Young* v. *Higbee Co.*, 65 S. Ct. Rep. 594; 89 L. ed. 578 and in not declaring that a constructive trust existed for the benefit and protection of the GF&A and its stockholders, the decision appealed from is contrary to that opinion.

2. The declaration of a constructive trust by a Court of Equity in a proceeding properly before it is a matter of law, if the essential facts are without dispute. Here the main facts are admitted and both the District Court and the Circuit Court have erred as a matter of law in failing to apply the facts to the law and declaring the existence of a constructive trust in favor of the GF&A and its stockholders. As the lower court has erred in this respect, we ask this Court to grant the writ of certiorari and later to declare the trust in a hearing upon the merits.

3. The decision below failed to apply the principles of equity as to the duty of one in a trust or fiduciary relationship with another as applied in a long line of decisions of this Court, such as *Buffum* v. *Barcelous Co.*, 289 U. S. 277, wherein it was held that "the standard of duty is no different whether the trust to be enforced is actual or constructive. The im-

plication of a trust is the implication of every duty proper to a trust."

4. The decision below was perhaps influenced by the sympathy of the lower court in the plan to perfect the reorganiation of the Seaboard Air Line Railway System. The Receivers and the Reorganization Committee were arms of the Court and these officers of the Court conceived and recommended the plan to purchase the bonds of the GF&A, without considering the rights and interests of the much smaller corporation and the lower court lost sight of the fact that "equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place."

Buffum v. *Barcelous Co.*, supra.

5. The decision below makes it impossible for the GF&A to work out any tenable or basicly sound reorganization plan. As of the date of the hearing before Judge Chestnut it had an asset of $1,667,000.00 in net earnings due it from the Seaboard Receivers, which the Circuit Court of Appeals' decision makes it impossible for the GF&A to use. By declaring, as it does, that "the title to these GF&A bonds is vested in the Seaboard Reorganization Committee free of any equity, claim or lien" in favor of the GF&A or its trustee, the decision makes it possible for the Reorganization Committee to file a claim against the bankrupt Company for approximately $4,000,000.00 and enforce it, when they only used $1,169,250.00 of Receivership funds in acquiring the bonds.

6. The decision below somewhat degenerates the issue to a question as to the superior equities between the Seaboard lien creditors and the GF&A and its stockholders, instead of holding the inquiry to the sole point involved, viz, the existence or non-existence of a trust or fiduciary relationship between the parties.

7. The decision below failed to follow the decisions of this Court and its own decisions to the effect that when the trust or fiduciary relationship is found to exist, the inquiry should stop and the transaction complained of should be set aside.

Trice v. *Comstock*, 121 Fed. 620. cited by the Circuit Court of Appeals for the Fourth Circuit as authority for its decision in the case of *Finefrock* v. *Kenova Mine Car Co.*, 22 Fed. (2nd) 627.

WHEREFORE, the Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on January 23, 1946.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PRELIMINARY STATEMENT

We refer to the foregoing Petition for a citation of the opinion below, a statement of the grounds of jurisdiction, and a statement of the case and the reasons given by petitioners for the granting of the Writ.

ARGUMENT

We do not see the necessity for a detailed argument in support of this petition.

We prepared a typewritten brief for the hearing in the District Court and filed it with Judge Chestnut. We cited ample authority upon the issues involved to sustain the allegations of the answer of the GF&A. Judge Chestnut in his opinion

charges the petitioners with considerable change of position in the course of the hearing. We have always held to the original position taken in our answer as follows:

> "The fiduciary relation existing between the Seaboard Receivers and the GF&A forbade them from taking advantage of their position of trust to benefit the Seaboard receivership estate to the injury and damage of the GF&A and its Receiver."

There seems to be no denial of the soundness of the authorities which we cited to the two lower courts in our briefs. It is in the application of the law to the facts upon which opposing counsel differ. Before Judge Chestnut and the Circuit Court of Appeals we quoted at length from this Court's recent opinion in the case of *Young* v. *Higbee Co.*, 65 S. Ct. U. S. 594, 89 L. ed. 578 where this Court declared the existence of a constructive trust (denied by both the District Court and the Circuit Court of Appeals in that case) in favor of all the preferred stockholders of the Higbee Company in funds secured by two stockholders from the sale of their stock *and their appeal to the Circuit Court of Appeals for the Sixth Circuit from an Order of the United States District Court for the Western District of Ohio,* confirming a plan of reorganization of the Higbee Company in bankruptcy. We think the facts of this case as to the existence of a constructive trust or fiduciary relationship are much stronger than those in that case.

If a writ of certiorari is not granted by this Court and a trust declared in favor of the GF&A and its stockholders, the great Seaboard System will be permitted to take over one of its much smaller associate lines and pay for it with the victim's own funds. We quote the following extract from our Reply Brief before the Circuit Court of Appeals:

> "A reorganization is practically impossible if the Reorganization Committee, with the aid of the Seaboard Receivers, are permitted to file claim for the full amount of the bonds, plus accrued interest.
>
> The last accounting statement from the Finance and

Accounting Department of the Seaboard Receivers shows that the net revenues of the G.F.&A. for the first six months of 1945 was $206,411. As of this time, using the first six months as a basis, the net amount due the G.F. &A. would be $1,873,862. The amount advanced by the Seaboard Receivers for the purchase of 90% of the G.F.&A. bonds was $1,180,500. Interest on this amount at 5% for two years is approximately $118,000. This would make $1,298,500 invested by the Seaboard interests in the bonds. If this amount was deducted from the credit balance of $1,873,862, it would leave the G. F. & A. $575,362. The appellants have assurances that the outstanding bonds, amounting to 10% of the whole issue, could be retired at the same figure given the Seaboard Receivers, to wit, $750 per bond, which would amount to approximately $130,000. Deducting this amount from the figure of $575,362, would leave $445,362. We could guarantee that the preferred stockholders would waive their claims for accrued dividends amounting to considerably over a million dollars, thus leaving the corporation without any outstanding debt at all. On this basis an almost perfect Reorganization Plan could be worked out, benefiting all stockholders, even the common stockholders.

This would be the result of the application of the equitable principles which we invoke in this case. On the contrary, if the Receivers of the Seaboard and the Reorganization Committee sustain their views, and are permitted to hold on to the bonds purchased by them without restraint, the total debt due on the bonds would be right at $4,000,000. In addition to preferred stock liabilities of $1,500,000, accrued interest on preferred stock dividends amounts to approximately $1,100,000. This huge indebtedness would preclude any Reorganization Plan, thus throwing the G. F. & A. back into the foreclosure proceedings in the U. S. District Court for the Middle District of Georgia. Equipped with a huge claim of nearly $4,000,000, they could 'then foreclose at some upset price

> —for as we all know nobody could bid against them—and then just take it over.' (Judge Lovett's words page 30 of Brief). Included in this sale would be the asset of $1,873,862. Having expended only $1,180,500 for the bonds, a neat profit of $693,362 and a railroad line of 133.6 miles would thus be the gain of the S. A. L. Receivers and Reorganization Committee, *and all paid for by the money due the corporation they were charged with protecting.*"

This would be the results of rejecting the principles of equity advocated by us, and substituting therefor the financial plans and aspirations of the reorganized Seaboard System.

In conclusion we repeat the words of Judge Lovett, 'That is not the equitable thing."

One of the main decisions we relied upon before the Circuit Court of Appeals was that of *Trice* v. *Comstock*, 121 Fed. 620 Judge Sanborn's opinion, concurred in by all the members of the Court, is a classic upon the question involved. He said:

> "Whenever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, *or of the law*, that he *becomes interested for him or interested with him, in any subject of property or business, he is in such a* FIDUCIARY *relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.* * * *
>
> The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust." (Italics ours).

NET EARNINGS OF G. F. & A. WERE DUE

Judge Chestnut's opinion, adopted by the Circuit Court of Appeals, devotes much space to the proposition that the net earnings of the GF&A were not due. His ruling that there was no earnings due is at variance with the decisions of this

Court in the cases of *United States* v. *The State Bank of North Carolina*, 6 Peters 29; *Ward* v. *Joslin*, 186 U. S. 143. These cases held that the word "due" simply means a "state of indebtedness" and is equivalent to "owe or owing."

Judge Chestnut contradicts himself quite conspicuously in his contention along this line. He contends that the amount was only a tentative balance, "subject to deductions for subsequent deficits" in the maintenance of the physical property of the GF&A, and hence that this cost might go as high as $1,300,000 (F. 39). Just a little further in his opinion he says:

> "It is, of course, not proposed by the Seaboard Receivers to incur extensive costs of betterments in the immediate future while the Georgia Court has under consideration the petition for giving notice of termination." (F. 42)

NOT AN ISSUE BETWEEN SEABOARD CREDITORS AND G.F.&A. AND ITS STOCKHOLDERS

The record reveals that at the last hearing and in his opinion Judge Chestnut had much to say about Messrs. Simpson and Borer, the owners of the first preferred stock of the G.F.&A. The record likewise shows that Mr. Fred L. Fuller, of Cleveland, Ohio, the original owner of 2500 shares of the second preferred stock, was permitted to intervene as a party in the hearing on June 18, 1945. He took the witness stand and expressly asked the Court to protect his interest. The other block of 2500 shares of preferred stock is held by some interests in New York, who have taken no stand one way or the other. Messrs. Simpson and Borer stood in the shoes of the original stockholders. The amount they paid for the stock has nothing in the world to do with this matter. This Court held in the case of *Young* v. *Higbee*, supra, that the motives of Mr. Young in bringing the action were entirely immaterial if it was brought in the interest of all the stockholders and for their protection. In this case the action is for the benefit of all stockholders, even the holders of the common stock, the Seaboard Air Line Railway Company, or whoever was the

purchaser of the Seaboard properties in the recent sales under order of the Court.

IMPOUNDING ORDERS NO DEFENSE TO BREACH OF FIDUCIARY RELATION

The Court also lays considerable stress upon the fact that any funds due the GF&A had been impounded for the mortgage trustee. It seems to us that this contention completely overlooks the fact that we are in an equity court, dealing with the great principles of equity. Equity looks to the substance and not to the form. All of these issues, such as the effect of impounding orders and the merits and demerits of the claims of the Seaboard creditors and the GF&A stockholders, become academic if a trust relationship existed. The asset or net earnings due the GF&A, amounting at the time of the last hearing in the District Court, was $1,667,000. According to a fair estimate it amounted on January 1, 1946, to approximately $1,873,862 and may be as much as $2,000,000 now. If a trust or fiduciary relationship existed between the Seaboard Receivers and the GF&A, this relationship should not be wiped out by an order of the Court or by acts of the Reorganization Committee. It is the duty of an equity court immediately upon the ascertainment of the existence of a trust or fiduciary relationship to stop the inquiry right there. It was the duty of the District Court to have done so in this case and a court of equity could have fairly adjusted the rights of the parties with reference to all the other minor matters above mentioned.

AUTHORITIES CITED

In the lower Court we cited the following decisions and authorities for our position with reference to the duty of one in a trust or fiduciary capacity and that it is the duty of a Court in which a matter of this character is being tried to declare a constructive trust where it appears that the law in this respect has been violated.

Angel vs. *Chicago, etc. Ry Co.* 151 U. S. 1; Am. Juris.

Vol. 2, p. 202; *Bolin* vs. *Bowen*, 118 Fed. 2nd., 59; *Buffum* vs. *Barcelous Co.* 289 U. S. 227, C. J. Vol. 53, 99 C. J. S. Vol. 30, 278 C. J. S. Vol. 2, p. 6-15; *Cragin* vs. *Powell*, 122 U. S. 692 C. J. Vol. 65, 222 C. J. Vol. 65, 652;*Ford et al* vs. *Buffalo Eagle Colliery*, 122, Fed. 2nd. 555; *Felix* vs. *Patrick*, 145 U. S. 317; *Holt* vs. *Henley*, 232 U. S. 637; *Institutional Investors* vs. *C. M. St. P. & P. Ry Co.* 318 U. S. 533; *Knight Newspapers* vs. *Commission of Internal Revenue*, 143 Fed. 2nd. 1011; *Meinhard* vs. *Salmon, et al*, 249 N. Y.; *Massie* vs. *Watts* 6 Cranch 148; *Ringo* vs. *Binns*, 10 Peters 269; *Sims* vs. *Edenborn*, 198 U. S. 131; *Sterns Co.* vs. *United States* 291 U. S. 54; *United States* vs. *Bank of N. C.* 6 Peters, 29; *Wendt* vs. *Fischer*, 243 N. Y. 439, 154 N. E. 303; *Ward* vs. *Joslin*, 186 U. S. 143; *White* vs. *Ewing*, 159 U. S. 36; *Wadsworth* vs. *Adams;* 138 U. S. 380;*Young* vs. *Higbee Co.*, 89 L. ed. P. 578; *Commissioner of Internal Revenue* vs. *Owens*, 78, Fed. 2nd, p. 768; *Continental Casualty Co.*, vs. *Powell et al*, 83 Fed. 2nd. p. 652, C. J. S. vol. 36, p. 740; *Finefrock* vs. *Kenova Mine Car. Co.*, 22 Fed. 2nd. page 627; *Godfrey* vs. *Powell* 150 Fed. 2nd. p. 482; *Iroquois Iron Co.*, vs. *Kruse*, 241 Fed. 433; *Trice* vs. *Comstock*, 121 Fed. 620.

CONCLUSION

In conclusion we contend that our case was brought squarely under the definition of a fiduciary in the case of *Trice* vs. *Comstock*, Supra, which was fully approved by the lower Court in one of its own decisions. The lower Court based its decisions largely upon the fact that a trust relationship could not exist in this case because the Seaboard Receivers had been forced by law to operate the G. F. & A. lines. The definition quoted above says that a fiduciary relation may be created by the act of "the law." In this case the trust relationship was even more sacred and binding because it was ordered by the Courts upon the petition and consent of the Seaboard Receivers who were given complete protection against any operation losses and in addition the right to come into the Courts upon notice and secure the consent of the Court to the cancel-

lation of the operating orders. They were charged to make an honest accounting with the little Georgia railroad corporation for the net earnings in their hands.

If this was not a trust or fiduciary relationship we do not know how one could be brought about.

We do not think the respondents should be allowed to take refuge behind the Reorganization Committee of the Seaboard Air Line Railway Company. This committee did not purchase the bonds on the open market with their own funds but purchased them with the aid of the Court out of Receivership funds which unquestionably had been materially built up by the net earnings of the GF&A. It has been asserted repeatedly that for the last two or three years the Receivers had been operating the Seaboard System Lines for the benefit of the Seaboard lien creditors. If this be true then the Receivers were acting for the Reorganization Committee and the new Seaboard reorganization, and the Reorganization Committee is absolutely tied to the Receivers and the Receivers and the District Court are equally bound to the Reorganization Committee.

For these reasons we earnestly contend that this Court should issue the Writ of Certiorari and hear the question upon its merits.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 1186

LEON S. DURE, Trustee of the Georgia, Florida & Alabama Railroad Company, and the Georgia, Florida & Alabama Railroad Company, Debtor,

Petitioner,

against

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and S. RALPH WARNKEN, constituting the Reorganization Committee of the Seaboard Air Line Railway Company, and LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Opinions Below

The *per curiam* opinion of the United States Circuit Court of Appeals for the Fourth Circuit, adopting the opinion of the District Court, is reported in 152 Fed. (2d), at page 756. It is printed in the Record at page 126. The order of the District Court appealed from is printed in the Record at page 15. The opinion of the District Court is reported in 62 Fed. Supp., at page 207, and is printed in the Record at page 27.

Preliminary Statement

The Courts below decided that no constructive trust should be imposed, for the benefit of Georgia, Florida & Alabama Railroad Company (hereinafter called the G. F. & A.) or its stockholders, on bonds of the G. F. & A. purchased by the Reorganization Committee of Seaboard Air Line Railway Company (hereinafter called Seaboard) pursuant to Court order and to the Seaboard Reorganization Plan, with money impounded for the benefit of Seaboard creditors. The Courts reached that decision on the ground that there was no fiduciary relationship between the Seaboard creditors or the Seaboard Reorganization Committee or the Seaboard Receivers, on the one hand, and the G. F. & A. or its stockholders on the other hand.

As clearly appears from the opinion of the District Court, the real issue in this case is between the bondholders of Seaboard whose money was used to purchase the bonds of the G. F. & A., and two holders of First Preferred Stock of the G. F. & A. who purchased $1,000,000 par value of First Preferred Stock for $5,000. It is not, as the petition repeatedly states, a question of a large railroad trying to take over a small railroad. The G. F. & A. has been a part of the Seaboard System since 1927. The two holders of the First Preferred Stock of the G. F. & A. (who are the real parties in interest on the side of petitioners) seek to separate the G. F. & A. from the Seaboard System so that they may operate it themselves or, at least, to beat down the claims of the bondholders to such an extent that they can realize a very substantial profit on their purchase of the First Preferred Stock.

The Seaboard creditors are represented in these proceedings by the Seaboard Reorganization Committee, re-

spondents herein, who purchased the G. F. & A. Bonds with the money of the Seaboard creditors pursuant to Order No. R-1 of the District Court of the United States for the Eastern District of Virginia (R., p. 9). The Seaboard Receivers, who are also made respondents, have no direct interest in the case. The Receivers appeared in the proceedings below primarily because the petitioners made charges of bad faith against them in connection with reports of the operations of the G. F. & A. Those charges are conclusively disposed of in the opinion of the District Court (R., pp. 46, 47) and need not be considered here.

It is well established that this Court will not grant certiorari unless the question presented is one of public or general interest or unless there is a conflict of decisions. The petition makes no effort to show that this question is one of public or general interest (as it clearly is not) and makes no real effort to show that the decision of the Circuit Court of Appeals in this case was in conflict with any decisions of the Court or of other Circuit Courts of Appeals.

The Petition on page 8 states:

> "If the fiduciary or trust relationship existed then this Writ should be granted so that this Court, upon a full inquiry, could decide whether the Circuit Court of Appeal's decision should be reversed. If a trust or fiduciary relationship did not so exist, our petition should be denied."

That statement incorrectly assumes that in considering whether or not the Petition should be granted this Court must first decide whether a fiduciary or trust relationship existed. That question is not presented to this Court by the Petition. This Court will only consider whether the exist-

ence or non-existence of such a relationship on the basis of the facts of this case is a question of such general interest as to require consideration by this Court. Obviously it is not.

The only attempt made by the Petition to argue that there are decisions of this Court or of other Circuit Courts of Appeals contrary to the decision in this case is the statement (Petition, p. 9) that the decisions below are contrary to the decision of this Court in *Young* v. *Higbee Co.*, 324 U. S. 204 (1945). As we show in the argument, below, there is no similarity between the basic facts in *Young* v. *Higbee Co.* and those in this case. The Petition assumes that there is a conflict in decisions because one case decides that a trust relationship exists, and another case decides, on completely different facts, that no such relationship exists. Obviously that is not a conflict of decisions but a difference in facts. No case is cited in the Petition in which the facts were in any respect similar to those in this case.

The only case which we have found involving substantially similar facts is the case of *Godfrey* v. *Powell,* 150 Fed. (2d) 486 (C.C.A. 5th, 1945), in which this Court denied certiorari on December 17, 1945. *Godfrey* v. *Powell,* 66 Sup. Ct. Rep. 272. In that case a trust relationship was claimed to exist on facts similar to those in this case. The District Court and the Circuit Court of Appeals for the Fifth Circuit found that no trust relationship existed and this Court denied certiorari. That denial is a clear precedent for a similar denial in this case.

Brief Summary of Facts

The petition contains a section headed "Summary Statement of Undisputed Facts." For the purpose of this brief we do not need to question the accuracy of that statement in so far as it is factual. However, it omits some very important facts and, therefore, it seems necessary to summarize very briefly the facts really essential for consideration by this Court.

The G.F.&A. was leased to the Seaboard in 1927. Shortly after the Seaboard went into receivership the Seaboard Receivers disaffirmed the lease as being a burden on the Seaboard estate and sought authority from the Interstate Commerce Commission to abandon operation of the G.F.&A. That authority was denied by the Interstate Commerce Commission. In 1935 an agreement was made between the persons then interested in the G.F.&A. and the Seaboard Receivers and was ratified by the Courts having jurisdiction, the G.F.&A. having theretofore been placed in the hands of receivers. That agreement provided in substance that the Seaboard Receivers should continue to operate the G.F.&A. properties for account of the G.F.&A., the earnings or deficits of those properties to be determined on the basis of the so-called General Formula then being used by the Seaboard Receivers to segregate earnings of the various Seaboard Mortgage Divisions. The agreement was to be terminable by either party on six months' notice and was to terminate in any event upon the termination of the Seaboard receivership. *The agreement expressly provided that no amount should be payable by either party to the other in respect of profits or losses arising from the operation until the termination of the agreement.*

When the G.F.&A. was placed under Section 77 of the Bankruptcy Act in 1944, the operating agreement was ratified by the Bankruptcy Court.

Subsequently the courts in charge of the Seaboard receivership directed that the so-called Kennedy Formula instead of the General Formula should be used to determine profits or losses of the G.F.&A., the Kennedy Formula having been the formula approved by the courts for use in connection with the Seaboard Reorganization Plan. The Kennedy Formula is more favorable to the G.F.&A. than the General Formula.

During the early years of operation under the operating agreement the earnings of the G.F.&A., even under the Kennedy Formula, varied from small deficits to small profits. After the beginning of the war, however, the earnings of the G.F.&A. under the Kennedy Formula became larger and if the operating agreement were to be terminated today the Seaboard Receivers would owe the G.F.&A. Trustee a substantial amount, the exact amount having not yet been determined because of certain accounting questions which have not been finally settled. It should be emphasized, however, that no amount now is, or ever has been, payable to the G.F.&A. Trustee, nor will any amount be so payable until the operating agreement is terminated. (See extract from Judge Chesnut's opinion, Appendix A hereto.) The G.F.&A. Trustee has never exercised his election to terminate the operating agreement.

At the end of 1943 a plan for the reorganization of the Seaboard was approved by the District Courts of the United States for the Eastern District of Virginia and for the Southern District of Florida. The G.F.&A. was included in that plan. The Courts found that the stock of the G.F.&A. had no value and should not participate in

the reorganization. The plan offered to the holders of G.F.&A. Bonds $750 in cash for each $1,000 bond.

Shortly after the Seaboard Plan was approved by the Courts a committee representing the G.F.&A. Bonds urged the Seaboard Reorganization Committee to make an immediate offer to purchase the G.F.&A. Bonds at $750 per $1,000 bond, as provided in the Plan, so that the G.F.&A. Bonds could receive the cash provided by the Plan without awaiting the consummation of the Plan if they desired to do so. The Reorganization Committee agreed to make such an offer if authorized to do so by the Virginia Court and applied for authority to do so. The Virginia Court granted the authority by order entered in February, 1944. (Record, p. 9) At the hearing preceding the entry of that order Mr. Simpson, who, with an associate, had theretofore purchased all of the first preferred stock of the G.F.&A. ($1,000,000 par value) for $5,000, requested Judge Chesnut to use the credit balance in favor of the G.F.&A. under the operating agreement to purchase the G.F.&A. Bonds for account of the G.F.&A. Judge Chesnut decided (a) that no money was then payable to the G.F.&A. under the terms of the operating agreement, (b) that if any money were so payable he had no power to dispose of it except by payment to the G.F.&A. Trustee, (c) that only the Georgia Court could determine the use of any moneys which might at any time become due to the G.F.&A. Trustee, and (d) that any money which might be paid over to the G.F.&A. Trustee had been impounded for the benefit of all holders of G.F.&A. Bonds. Accordingly, he granted the petition of the Reorganization Committee, directed the Seaboard Receivers to advance to the Reorganization Committee, out of impounded moneys held by the Seaboard Receivers for the benefit of the Sea-

board bondholders, the amount necessary to purchase the G.F.&A. Bonds, and directed that any amounts which might ultimately become payable to the G.F.&A. or its Trustee under the operating agreement should be held in, and paid out of, a reserve fund of $6,000,000 which had been created pursuant to the Seaboard Reorganization Plan for the purpose of providing for expenses of reorganization and other requirements.

The Reorganization Committee made the offer and it was accepted by holders of 90% of the G.F.&A. Bonds.

Thereupon the G.F.&A. and the G.F.&A. Trustee instituted proceedings in the Georgia Court against the Seaboard Receivers and the Seaboard Reorganization Committee seeking to impose a constructive trust on the purchased bonds for the benefit of the G.F.&A. and its Trustee. The Seaboard Receivers and the Seaboard Reorganization Committee appeared specially to contest the jurisdiction of the Georgia Court over them and the Georgia Court sustained their contentions and dismissed the proceedings.

In view of that action, however, the Reorganization Committee deemed it wise to have the question of their title to the purchased G. F. & A. Bonds specifically considered by the Virginia Court and, accordingly, filed a petition in the Virginia Court to remove a cloud on their title to the G. F. & A. Bonds. That petition was filed not because, as stated on page 8 of the petition, the Reorganization Committee felt "that there would remain a serious question as to its title to the bonds" but because, in view of the attack on title made by the G. F. & A. and its Trustee and in view of the fact that the G. F. & A. Trustee had not been a party to the Seaboard receivership proceedings, it seemed fair and

wise to have the question definitively litigated and settled in a proceeding to which the G. F. & A. Trustee would be made a party. It was specifically understood that the matter would be considered by Judge Chesnut *de novo*, without regard to the fact that it had been in substance already decided by Judge Chesnut's order of February 8, 1944, authorizing the purchase of the G. F. & A. Bonds.

Judge Chesnut, after a full hearing, wrote a complete and detailed opinion (R., pp. 27-56) in which he reached the conclusion that the Reorganization Committee had title to the purchased G. F. & A. Bonds and that no constructive trust should be imposed thereon for the benefit of the G. F. & A. or its Trustee. The G. F. & A. and its Trustee appealed from that decision and the Circuit Court of Appeals affirmed on the basis of the opinion of the District Court without writing a new opinion. It is from that decision of the Circuit Court of Appeals that certiorari is now sought.

Argument

POINT I

Petitioners have shown no grounds for granting the petition.

1. Petitioners do not claim that this case presents any question of public or general interest.

As indicated above, petitioners do not claim that the question which they seek to have this Court decide is one of public or general interest. Clearly it is not such a question. The question decided by the courts below was simply

whether *on the facts of this particular case* there was any such relationship between the Seaboard creditors or the Seaboard Receivers or the Seaboard Reorganization Committee, on the one hand, and the G.F. & A. or its Trustee or its stockholders, on the other, as would give rise to a constructive trust in favor of the G.F. & A. Trustee in respect of G.F. & A. Bonds purchased by the Reorganization Committee with money belonging to the Seaboard creditors. The answer to that question depends entirely on the facts of this particular case and the courts below, after consideration of all the facts, have found that there was no such relationship. No question of public or general interest is involved. The Courts below did not decide any novel or important question of law. They merely applied well established legal principles to the facts of this case.

2. There are no decisions of this Court or of the Circuit Courts of Appeals which are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in this case.

Petitioners claim that the case of *Young* v. *Higbee Co.*, 324 U. S. 204 (1945) is contrary to the decision of the Circuit Court of Appeals in this case. There is no analogy whatsoever between the two cases. In *Young* v. *Higbee Co.* this Court decided that when two holders of preferred stock of a corporation being reorganized under Chapter X of the Bankruptcy Act appealed from an order approving a plan of reorganization and then made a settlement involving the sale of their stock and their appeal at a price far in excess of the value of their stock, they must be held, under the law affecting bankruptcy cases, to have acted not only for themselves but for all other stockholders similarly situated

and could be held accountable to such other stockholders for the excess of the amount which they received on the settlement over the fair value of their stock.

A mere statement of the question involved in *Young* v. *Higbee Co.* is sufficient to show that there is no analogy between that case and the present case. The same thing is true as to all of the cases cited on pages 17 and 18 of the petition. In no one of them were the facts in any way analogous to the facts of the present case.

There is, however, one decision which is substantially on all fours with the present case. That is the case of *Godfrey* v. *Powell*, 150 Fed. (2d) 486 (C. C. A. 5th, 1945), in which this Court denied certiorari on December 17, 1945. *Godfrey* v. *Powell*, 66 Sup. Ct. Rep. 272. That case also arose in connection with the Seaboard reorganization. It was claimed that the Seaboard Receivers, who were also receivers of the lines of a subsidiary company (the Seaboard-All Florida), must be charged with a constructive trust in respect of Seaboard-All Florida Bonds which they, as Seaboard Receivers, purchased out of funds belonging to the Seaboard creditors, such constructive trust to be in favor of the Seaboard-All Florida bondholders who did not sell their bonds to the Seaboard Receivers. The Circuit Court of Appeals held that there was no constructive trust and this Court denied certiorari.

The relationships in *Godfrey* v. *Powell* were not, in substance, different from the relationships in this case and the decision of the Circuit Court of Appeals for the Fourth Circuit in this case was in accord with the decision of the Circuit Court of Appeals for the Fifth Circuit in that case.

POINT II

The decisions of the Circuit Court of Appeals and of the District Court in this case were correct.

The opinion of the District Court, printed in the Record at pages 27 to 56, inclusive, sets out so clearly and fully all of the arguments made on behalf of the petitioners here, and the conclusive answers to those arguments, that we respectfully refer this Court to that opinion if this Court should be interested in a full statement of the facts and of the basis of the decisions below. We believe, however, that no such consideration is necessary in this case because it is so clear that this is not a case which justifies the exercise by this Court of its powers of certiorari.

POINT III

The petition for certiorari should be denied.

The petition for certiorari should be denied, with costs, and such other relief as to the Court may seem just.

Dated May 14, 1946

Respectfully submitted,
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APPENDIX A

Extract from Opinion Filed July 31, 1945, of Judge W. Calvin Chesnut

(R. pages 41-43)

"The first contention of the G. F. & A. is that the bonds were paid for by moneys held by the Receivers for the account of the G. F. & A. and then payable to it; or at least that it should be held that the cost of the bonds should be charged against the G. F. & A. in the operating account. This contention is clearly untenable. Under the operating orders there is not now and never has been in the past any sum of money due from the Seaboard Receivers to the G. F. & A.; and whether on final account there will be any sum due and payable is still a matter of uncertainty. It is also presently uncertain when the operating agreement will be terminated. Evidently the Georgia Trustee is not now prepared to make a recommendation to the Georgia Court that it should be terminated. Even if the Georgia Court promptly decides to authorize its Trustee to give the six months notice for termination, I understand the approval of the Interstate Commerce Commission would have to be obtained before independent operation of the Road by the G. F. & A. or satisfactory arrangement made for its continuation in the public interest. Likewise I assume that if this court should now authorize the Seaboard Receivers to give notice of termination, approval of the Interstate Commerce Commission would also be necessary. It is well known that at the present time railroad operations are largely under the control of the Interstate Commerce Commission in the public interest. And if the operation must be continued by the Receivers for a considerable time in the future, the cost of much needed deferred maintenance and betterments will probably greatly reduce or exhaust the present 'tentative' credit. * * *

"Apart from this consideration, there is clearly no authority under the present operating orders to charge the purchase price of the bonds to the operating account. And this court clearly would have no authority to make such a charge if there were now presently due and payable a credit balance to the G. F. & A. It would as a matter of law have to be paid to the Georgia Trustee for proper disposition under section 77, and apparently any net sum remaining after other proper disposition of the funds, would be claimed by the Bankers Trust Company as Trustee under the GF&A mortgage, in consequence of prior impounding orders obtained by it from the Georgia court. It also appears from the evidence in this case that any net earnings to which the GF&A might now be entitled would be possibly subject to the payment of income taxes, which is a matter, of course, with which this court is not concerned but would necessarily be involved in the Georgia Trustee's accounting in the Georgia Court. Under no aspect of the case would it have been permissible for this court when the original order for the purchase was made on February 8, 1944, or at this time, to direct that the cost of the bonds be charged against the operating accounts."